BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PRIME LOCATION PROPERTIES, LLC, Petitioner,	)	
v.	)	PCB 09-67
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Thomas Davis
Assistant Attorney General
500 S. Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a PETITIONER'S MOTION FOR LEAVE TO FILE REPLY MEMORANDUM *INSTANTER*, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 5th day of October, 2009.

Respectfully submitted,
PRIME LOCATION PROPERTIES, LLC, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PRIME LOCATION PROPERTIES, LLC, Petitioner,	)	
v.	)	PCB No. 09-67
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S MOTION FOR LEAVE TO FILE REPLY MEMORANDUM *INSTANTER*

NOW COMES Prime Location Properties, LLC, by its undersigned counsel, and moves the Board for leave to file a reply in this matter, stating as follows:

1. On August 20, 2009, the Board entered an Order directing Prime to file a statement of its legal fees by September 21, 2009, and giving the Illinois Environmental Protection Agency (hereinafter "IEPA") fourteen days to file a response. No time was provided in the Order for a reply.

2. On September 17, 2009, Petitioner filed its Motion for Authorization of Payment of Attorney Fees as Costs of Corrective Action.

3. On October 1, 2009, the IEPA filed its Objection to Attorney Fees.

4. In the IEPA's Objection to Attorney Fees, clarification is sought with respect to Petitioner's billing records. Petitioner believes it would be appropriate to reply to that request and believes it would be prejudiced if it was not allowed to reply to said request.

5. Furthermore, the IEPA raises numerous objections to the Board's ruling in Illinois Ayers Oil Company v. IEPA, PCB 03-214 (Aug. 5, 2004). Petitioner did anticipate such reargument of the Board's prior rulings and while it is quite possible that the Board will not

receive the invitation to relitigate Illinois Ayers, Petitioner could be prejudiced by a number of legal and factual errors that permeate the IEPA's arguments for doing so.

WHEREFORE, Petitioner prays for an Order authorizing the filing of the attached Reply Brief *Instanter*, and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

PRIME LOCATION PROPERTIES, LLC,
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
its attorneys

BY: /s/ Patrick D. Shaw
Patrick D. Shaw

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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PRIME LOCATION PROPERTIES, LLC, Petitioner,	)	
v.	)	PCB No. 09-67 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S REPLY MEMORANDUM TO OBJECTIONS TO ATTORNEY FEES

NOW COMES Petitioner, PRIME LOCATION PROPERTIES, LLC, by its undersigned counsel and in reply to Respondent's Objection to Attorney's Fees, states as follows:

I. CLARIFICATION OF LEGAL RATES

The IEPA complains of what it perceives to be different billings rates of attorney Shaw. Prime Location Properties, LLC is represented in this matter by Patrick D. Shaw and Fred C. Prillaman, both of whom entered an appearance herein. Attorney Prillaman's rate is $220 per hour, and attorney Shaw's rate is $165 per hour, both of which are the standard billed rates. Mr. Prillaman's involvement (4.1 hours) was primarily at the beginning of the appeal before anybody filed an appearance for the IEPA.[1]

II. ILLINOIS AYERS IS BINDING PRECEDENT ON THE IEPA.

Most of the IEPA response appears to be a running commentary and critique of the Board's decision in Illinois Ayers Oil Co. v. IEPA, PCB 03-214, (Aug. 5, 2004), including issues

[1] In addition, Prime Location Properties, LLC, the owner/operator of the property, is the entity incurring and paying legal bills, not the consultant.

raised and lost therein. For example, the IEPA argued in Illinois Ayers that no legal defense costs had been incurred by the owner/operator because the legal bills were being incurred by Illinois Ayer's consultant. Illinois Ayers filed a response pointing out that there is no legal precedent for requiring the party to pay their attorney's fees in order to receive an award of attorney's fees.[2] Resp. In Opp. Mot. For Leave to Amend, at ¶9 (July 16, 2004). The Board did not reach all of those arguments, some of which are cited in Footnote 2 herein, but simply found that whether the owner or operator paid the legal fees was irrelevant under the statutory language. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, at p. 2.

The IEPA did not appeal Illinois Ayers, and Petitioner will focus it's reply to arguments that were not raised therein.

A. THIS IS NOT A COMMON FUND CASE.

At several points, the IEPA comments negatively on the notion that this statute is a fee-shifting provision, and appears to argue that this case is subject to the common fund doctrine. (Objection, at p. 7) The common fund doctrine has no applicability here, but if it did, the attorney fee demand would be higher.

The common fund doctrine only applies "where the outcome of the litigation has created a common fund . . . in which others have an ownership interest." Brundidge v. Glendale Federal Bank, 168 Ill. 2d 235, 238 (1995). It is most commonly applied in class action lawsuits where the class attorney has obtained a benefit for everyone in the class, even people with whom the

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[2] It is completely irrelevant whether or not the party entitled to attorneys' fees actually paid attorney fees. Brubakken v. Morrison, 240 Ill.App.3d 680, 686 (1st Dist. 1992); see also Pitts v. Holt, 304 Ill.App.3d 871, 874 (1st Dist. 1999) (holding that whether or not the client agreed to pay a fee or whether the attorney agreed to accept any awarded attorney fees are not valid bases on which to deny or limit an attorney fee award).

attorney does not have a client relationship. The members of the class have obtained a right to payment that is legally enforceable. In such cases, courts may use their equitable powers to spread the cost of litigation proportionateley among the fund beneficiaries "based upon a percentage of the amount recovered on behalf of the plaintiff class." Id.

A common fund was not created in this case. To do so, the Board would have had to find that not only had the IEPA violated the law, but that it had done so to the detriment of a large class that now have a right to be reimbursed. In such a case, the attorney fees would be awarded as a percentage of the class's claims. Typically, the attorney obtains an award equal to twenty-five percent of the class recovery, which has led to complaints of "strikingly large fee awards . . . disproportionate to the actual efforts expended by the attorneys." Id. at 241. The case cited by the IEPA merely discusses the considerations for merely awarded the attorney for his or her actual efforts.

Unlike common funds which are based on "court's inherent equitable powers," id. at 238, the LUST Fund was created by act of legislation. A cursory review of those provisions indicates that the Board is only authorized to review the matter which has been timely appealed, and the Board would appear to have no implied power to create a common fund to provide relief to a class of claimants that have been victimized in the past by any course of unlawful IEPA decisions.

B. ALL AWARDS OF LEGAL COSTS ARE INTENDED TO ENCOURAGE LITIGATION AND DISCOURAGE THE LOSING PARTY'S CONDUCT.

In Chicago v. Illinois Commerce Commission, 187 Ill. App. 3d 468, 470 (1st Dist. 1989), the Illinois Appellate Court ruled that an award of attorney's fees was meant to discourage

conduct upon the part of the state and provide encouragements for those affected by government action to challenge the state. The IEPA appears to believe the Board has tacitly accepted this principle that was only meant for attorney-fee awards under the Administrative Procedures Act. (5 ILCS 100/10-55(c))

Certainly, the Chicago case involved a different statute than the one here, but common sense tells us that all statutory provisions that award a party their legal costs are intended to alter the status quo. The American Rule is that a party to litigation bears its own legal expenses and for a statute to expressly override that Rule is a clear indication that different motivations are in order. Statutes which authorize an award of legal costs to the prevailing party have three purposes in mind: **(1) provide access to legal process**; e.g., Pennsylvania v. Delaware Valley Citizen's Council, 478 U.S. 546, 565 (1986)("the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of . . . laws. Hence, if plaintiffs, . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied."); **(2) encourage vindication of rights;** e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978) (interpreting statutes that cast plaintiff "in the role of 'a private attorney general,' vindicating a policy that Congress considered of the highest priority ... [who] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."); **(3) discourage violations;** e.g., Riverside v. Rivera, 477 U.S. 561, 578 (1986) ("if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in

court.").[3]

Since the IEPA raises the testimony of Cindy Davis, a consultant that testified in the R04-22 and R04-23 hearings, the larger context of her testimony is relevant here:

> **Here's what happens. You submit -- I submit our plan. The Agency takes 120 days to review it, gives me a final decision. Sometimes it's 120 days, sometimes it's earlier. If I don't like the amendments, I have my choice to either resubmit or I can appeal to the Board. If I resubmit it, I have -- since that was a final decision, I have to resubmit a whole new plan which means it goes to another 120 day review. I can appeal, but it's costly to appeal. And you have to look at is it $1,500 problem, a $20,000 problem and what's the appropriate action. You can't really afford to go and hire an attorney to represent you in front of the Board for a $1,500 problem.**

In re Proposed Amendments to Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 & 734), R04-22 & R04-23 (June 21, 2004 transcript), at p. 102[4]

This testimony supports the award of legal costs when the IEPA has wrongfully rejected a plan or budget. All of the policy considerations for fee awards apply here. When the IEPA wrongfully rejects a plan or budget that costs less than the estimated cost of an appeal, there is very little incentive for an owner or operator to file an appeal. The availability of a fee award

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[3] Where the statute is silent, Illinois courts frequently look to federal case law. Berlak v. Villa Scalabrini Home for the Aged, 284 Ill. App. 3d 231, 236 (1st Dist. 1996); see also Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (setting forth standards "applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'").

[4] Transcript excerpts are attached hereto as Exhibit A.

gives owners and operators (and their consultants) access to the legal protections from wrongful decisions offered by the Board. By giving the owner/operator an incentive to appeal, the primary purpose of the LUST Fund is promoted, i.e., to provide financial means to cleanup petroleum contamination. And finally, the availability of the award serves as a disincentive to future wrongful decisions. In this case, the IEPA's decision appeared to be directly contrary to two prior Board decisions. Prime Location Properties, LLC v. IEPA, PCB 09-67, at p.15 (Aug. 20, 2009)(finding decision consistent with Board's decision in Swif-T-Food Mart); Swif-T Food Mart v. IEPA, PCB 03-185, at p. 11 (May 20, 2004) (finding IEPA's argument unpersuasive to overrule Mac Investments d/b/a/ Olympic Oldsmobile v. OSFM, PCB 01-29, at p. 11 (Dec. 19, 2002)). Hopefully, this is the last occasion in which any owner/operator will have to either pay the deductible or appeal.

Generally, courts have exercised their discretion to award legal costs, except where special circumstances exist where the purpose of the fee award runs contrary to the enabling statute. See Callinan v. Prisoner Review Bd., 371 Ill. App. 3d 272, 277-78 (3rd Dist. 2007) (summarizing caselaw under Freedom of Information Act, Consumer Fraud Act and federal Civil Right law, which generally encourage award absent special circumstances that would render such an award unjust). Petitioner submits that no such special circumstances have been raised herein; particularly none that would differentiate an award from that given in Swif-T-Food Mart.

C. THE BOARD HAS ADDRESSED REASONABLENESS OF THE FEE REQUESTED IN THE PAST.

The IEPA erroneously states on page 2 that the "standard" of reasonableness of attorney's fees was not established in Illinois Ayers. This is not correct. The Board ruled that the petitioner

had presented "an affidavit and an exhibit to the affidavit specifying the legal services provided" and the IEPA had merely argued that certain technical issues should not be reimbursed, a distinction the Board did not accept. Illinois Ayers Oil, PCB 03-214, at p. 9 (Aug. 5, 2004).

The Board also indicated in its ruling that "Ayers noted that the burden shifts to the Agency to rebut the reasonableness of the fees." Id. This statement was based upon an Illinois Appellate Court holding that "once an attorney has put forth evidence of a reasonable fee, "the court must provide reasons justifying [a] particular cut in [the] hours or fees imposed." Shortino v. Illinois Bell Tel. Co., 279 Ill. App. 3d 769, 773 (1st Dist. 1996). The Illinois Appellate Court affirmed the trial court's decision to award the claimed fee where "[t]he objectors put no evidence in the record which would convincingly counter the fee claim." Id.

The petitioner's evidence of the hours expended and hourly rates filed herein is evidence of reasonableness of the fees sought, just as they were in Illinois Ayers. The IEPA cannot simply chide the Board's attention to details from the sidelines (Objection, at p. 9), without offering evidence or point to issues in the evidence. Other than the clarification sought for the different billable hourly rates, there is no claim that the hours expended were unreasonable or the rates charged unreasonable. There are a number of cases in which such accusations have been made, e.g., Ardt v. State of Illinois, 292 Ill. App. 3d 1059 (1st Dist. 1997) (remanding for hearing on billing 24 hours a day), but none has been made here.

WHEREFORE, Petitioner, PRIME LOCATION PROPERTIES, LLC, prays for an order awarding the requested attorney fees herein.

Respectfully submitted,
PRIME LOCATION PROPERTIES, LLC,
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
its attorneys

BY: /s/ Patrick D. Shaw
Patrick D. Shaw

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ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PROPOSED AMENDMENTS TO: R04-22
REGULATIONS OF PETROLEUM LEAKING (UST Rulemaking)
UNDERGROUND STORAGE TANKS
(35 ILL. ADM. CODE 732)

IN THE MATTER OF:

PROPOSED AMENDMENTS TO: R04-23
REGULATION OF PETROLEUM LEAKING (UST Rulemaking)
UNDERGROUND STORAGE TANKS
(Consolidated)
(35 ILL. ADM. CODE 734)

The Rulemaking Proceeding, before the Illinois Pollution Control Board, was held June 21st, 2004, at 10 a.m. at the offices of the Illinois Pollution Control Board, 1021 N. Grand Avenue East, Training Room, 1214 West, North Entrance, Springfield, Illinois, before Marie E. Tipsord, Chief Hearing Officer.

Reported by: Beverly S. Hopkins, CSR, RPR
CSR License No.: 084-004316

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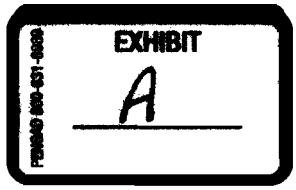

MS. MANNING: Yeah, let's talk a little bit about what transpired at these meetings then. There were some litigation going on as well as the Ayers case was pending before the Board and was decided by the Board as well that a case CW3M had regarding the rate sheet. And if you could explain a little bit about sort of what the genesis is, the Board's meetings with the Agency were regarding the emergency rule proposal and what led to the document that finds itself as Exhibit 44, and then we'll go through that a little bit in terms of what PIPE's concerns got put into the emergency rule?

MS. DAVIS: Well, I'm sure everybody is aware the Illinois Ayers case, which was a case -- the Illinois Ayers Beardstown case is a -- was a CEC, is still is a CEC client.

MS. MANNING: In fact, you testified in that proceeding?

MS. DAVIS: I testified in that proceeding and so did Jeff Wienhoff. Our main concern with Illinois Ayers was that the Agency was using a rate sheet that we felt was unfair, that hadn't gone through rulemaking. That we never felt we had a chance to comment on. The Agency's standard in the last few years, when they started using the rate sheet, was to -- when we submitted a budget for either a corrective action plan or site investigation, you would get a letter back saying we're cutting maybe $1,500 from personnel, just whack, whack, whack. No explanation given to us as to other than it exceeds minimum

requirements of the Act. Then we tried to call up the project manager to find out what specifically was wrong with our budget. Sometimes they could help, sometimes they couldn't. We would resubmit, and what we found is we were just wasting time. The Agency wasn't interested in approving any other costs other than what was on their rate sheet.

Hence, the reason we decided to appeal Ayers. I paid for the appeal on Ayers, and not the owner/operator. The reason I did is, I guess it was just something that stuck in me that I didn't feel was right, and it was affecting my business, driving the cost of cleanups up because all we were doing was spending time trying to justify why we were needing more money than the Agency was willing to give to us. The Agency has told us that over and over again that all their project managers full-time on budget, that they'd like to have their project managers spend more time reviewing technical work. All my project managers do is spend all their time trying to justify their costs. Corrective action plan, very few corrective action plans have been approved in the last few years because of the cost problems submitting it back and forth, back and forth, submitting justification and we're just not getting anywhere.

So Ayers kind of brought that to head. The Agency had made some technical cuts, felt that the borings that we had proposed were excessive and the money that we requested was excessive.

The Board agreed with Ayers against the Agency and ruled that the rate sheet was invalid in response to that. That was on April 1st. On April 21st, CW3M went into court and the judge --

MR. KING: Just so you know, that is -- as I understand that's not a closed site.

MS. DAVIS: Illinois Ayers?

MR. KING: Yes.

MS. DAVIS: No.

MR. KING: We are talking about the site that's still an open site so, I mean --

MS. MANNING: She's just giving background in terms of --

MR. KING: Well, I mean, we were questioned about that earlier today, about talking about and asking questions about a site that was, in fact, still an open and not a closed manner. I mean, we got a decision in this.

HEARING OFFICER TIPSORD: You beat me to the punch. I was just going to remind her that that was -- Technically speaking that case is still appealing -- still before the Board currently on some motions.

MS. MANNING: Yes.

HEARING OFFICER TIPSORD: I don't think you have -- I mean, I think she stayed within what the published has been, but thank you, Mr. King.

MS. MANNING: Whey don't you just stay away from --

HEARING OFFICER TIPSORD: Thank you for pointing that out to her.

MS. MANNING: Get into the whole reason for this PIPE and CECI joining in an emergency rule motion.

MS. DAVIS: Apparently after some decisions were made by the Board, the Agency had trouble with deciding what was reasonable. If they can't use the rate sheets, then the determination of reasonable became a problem for them. So they asked the Board for an emergency rule to go ahead and implement Subpart H as proposed. PIPE met with the Agency and we were opposed to emergency ruling feeling that the Agency created the problem itself, created the emergency, by not going through rulemaking years before on the rate sheet. However, though the Agency told us they had a problem, they didn't know how to pay. Didn't know how to make payments. So we decided we would work with them and come up -- we have to have an emergency rule to determine reasonableness so let's work together and hopefully we can come up --

MS. MANNING: By the way, what did they do with the payments during this period of time?

MS. DAVIS: They were held up for a while. And then they agreed that they would process the payments based upon the certification of the professional engineer or the professional geologist.

MS. MANNING: Okay.

MS. DAVIS: The emergency rule that we worked together on, we worked together on establishing price for reasonableness by using RS Means.

MS. MANNING: Now to be fair, though, this was an interim measure indicating CECI agreed that this an interim measure pending the Board ruling on the rule?

MS. DAVIS: Right. So we just thought during an emergency meeting, the time frame between rulemaking and now is to help the Agency determine reasonableness and go ahead and proceed payments that RS Means is an estimating book that's used in the construction industry. It's published third party information. And we can start with that. They have pretty much everything included in there. The only problem was RS Means did not have all the personnel data that the Agency needed. So we worked with the Agency coming up with the personnel titles and rates. And what we did was pulled data from RS Means where we could and the Agency proposed -- we started with the Agency's proposed rate in Subpart H and adjusted them.

MS. MANNING: By the way, if I could step in now, I don't think the RS Means book that we're discussing is in the record yet but we will -- we will make sure that before the end of the hearing it will be.

HEARING OFFICER TIPSORD: You beat me to another punch.

MS. DAVIS: The other issue the Agency had was the excavation, transportation disposal. They felt they had -- I think maybe they had -- I think they thought maybe they had better data than what RS Means was so we worked together to come up with a unit price for those soil removals and disposals because the Agency was insistent that they needed a unit price for that to control cost. And I know there was some cost in here about concrete, asphalt, but I don't remember.

BOARD MEMBER JOHNSON: You say you worked together, you know, took the proposed rates, the Subpart H proposed rates, and you adjusted them accordingly. And in this proposed emergency rulemaking did you adjust -- did you adjust only up or did you adjust any of them down?

MS. DAVIS: No, I think some went down. I think there was adjustment both ways.

BOARD MEMBER JOHNSON: Okay.

MS. DAVIS: I think. I didn't work specifically on that, but I believe there was. But I think the biggest thing that we put in the emergency rule was that is if the Agency would rely upon the professional engineer or the professional geologist certification, and if they thought there was something that wasn't reasonable, the Agency would give us detailed reasons of denial other than exceeds minimum requirements of the Act.

And also we worked out an agreement where the Agency would

send us a draft denial letter prior to the 120 days per final decision. And with that draft denial letter, then we would be able to work out, we were hoping, many of our differences prior to the final decision. We felt that that gave us the ability to move the project along and get into remediation faster and also would cut down the number of appeals going to the Board. The Agency agreed to that, and it was in the emergency rule proposal.

MS. MANNING: Talk a little bit about the LPE and LPG certification, if you will, what particular -- what particular decisions that are made that are presented to the Agency have to have that certification, corrective action plan?

MS. DAVIS: Well, every -- yes, all budgets, plans, amendments basically have to be certified by the professional engineer or professional geologist. The corrective action submitting report can only be certified by a professional engineer.

MS. MANNING: And what kind of difficulty, if any, have you experienced in -- in getting modifications from the Agency or getting denials from the Agency on a budget that includes a scope of work that was signed off by LPE or the LPG determining that that was the appropriate amount of work necessary for that particular task?

MS. DAVIS: Well, many times the Agency goes through and cuts our scope of work. We estimate that -- If our engineer

estimates it was going to take 10 hours of a particular person on site to do the work, the Agency a lot of times would cut in half or cut -- or the explanation was it exceeded minimum requirements of the Act. As you could see exceeding requirements of the Act was giving us a lot of problems, which is why we liked, in the emergency rule, which is where the Agency actually gave us more reasons than that.

Another problem that happens, if the Agency waits until the 120th day, gives you a denial letter or adjusts your budget, you had no where to resubmit any information because you have -- Here's what happens. You submit -- I submit our plan. The Agency takes 120 days to review it, gives me a final decision. Sometimes it's 120 days, sometimes it's earlier. If I don't like the amendments, I have my choice to either resubmit or I can appeal to the Board. If I resubmit it, I have -- since that was a final decision, I have to resubmit a whole new plan which means it goes to another 120 day review. I can appeal, but it's costly to appeal. And you have to look at is it $1,500 problem, a $20,000 problem and what's the appropriate action. You can't really afford to go and hire an attorney to represent you in front of the Board for a $1,500 problem. So you talk to the owner/operator, and they say, well, they'll either eat that cost and go ahead and pay us or they decide they want to appeal. A lot of times they eat the cost, not because they agree with it,

but because they can't afford to appeal the decision.

BOARD MEMBER JOHNSON: That's what they've been doing then. If you have a specific plan in which you say it's going to take 10 hours and the Agency says, no, it's only going take five, then your owner/operator pays for the additional five hours or you just didn't do the additional five hours worth of work?

MS. DAVIS: Most of the time the owner/operator either pays the additional five hours so they can still do the work but --

BOARD MEMBER JOHNSON: Half price.

MS. DAVIS: Half the price.

MS. MANNING: And in effect, without risking another objection from Mr. King about the Ayers case, and sticking with just the decision the Board has already made in the Ayers case, wasn't the issue in the Ayers case a question of judgment in terms of the amount of work? Wasn't it an issue in the amount of borings?

MS. DAVIS: Amount of borings and amount of time necessary to do the work.

MS. MANNING: Thank you. Let's go into time frames for a little bit. There's been a lot testimony in the -- there's been quite a bit of testimony in the hearing about the various time frame that it takes, and I believe, when the Agency testified on March 25th, they put an exhibit into evidence that deals with the quick time frames in terms of reimbursement once all the